IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 868 of 1982

For Approval and Signature:

Hon'ble MR.JUSTICE M.C.PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

DESAI SHAH CONSTRUCTION CO

Versus

SAGARKHED SURVODAYA COOP SOC

Appearance:

MR DHAWAL VYAS for MR DD VYAS for Appellant

MR ADIL R MIRZA for Respondent No. 1

CORAM : MR.JUSTICE M.C.PATEL

Date of decision: 30/07/2003

ORAL JUDGEMENT

1. This first appeal under Section 96 of the Code of Civil Procedure is directed against the judgment and decree dated 15th July, 1981 passed by the learned Civil

Judge (S.D.), Valsad in Special Civil Suit No.10 of 1978 whereby the learned Judge dismissed the said suit filed by the appellant.

2. The appellant's case in the plaint was as follows:

2.1 The appellant - plaintiff was a registered partnership firm and carried on the business of constructing houses. The defendant was a housing society in the name of "Sagarkhed Survodaya Housing Society" situated at Valsad. The society had given a contract to the plaintiff for constructing houses for the society. There was a dispute between the parties and the plaintiff, therefore, filed a suit under the provisions of the Gujarat Co-operative Societies Act and it was referred for decision to the Nominee under the said Act. There was a compromise between the parties under which the defendant agreed to pay Rs.87,381/- to the plaintiff, out of which, the defendant paid Rs.35,000/- by cheque and the remaining amount of Rs.52,381/- was outstanding. The plaintiff, therefore, filed Execution Application in the court of Civil Judge (S.D.) at Valsad. The said application was rejected on the ground that the award passed by the Nominee was illegal and was not executable. The plaintiff, therefore, filed the present suit for a decree in terms of the compromise. Before the suit was filed, the plaintiff had also challenged the order of the Civil Court dismissing their Execution Application by filing an appeal in the High Court which was pending when the present suit was filed.

3. The defendant, in its written statement, interalia contended that the suit was bad for want of notice under Section 167 of the Gujarat Co-operative Societies Act and that the suit was not maintainable for the same subject matter before two forums.

4. The learned Judge framed the issues as follows:

(1) Does plaintiff prove that there was an agreement dated 20-3-69 by and between the parties before the nominee of the Registrar?

(2) Whether the defendant can claim Rs.52,381/- as stated in the said agreement without performing the construction work which he was obliged to make under the said agreement?

(3) Does defendant prove that the plaintiff did not execute the said work as he was confident that the agreed work is going to cost him more than Rs.52,381/-?

(4) Is plaintiff entitled to interest by way of damages?

(5) What is due to the plaintiff?

(6) Whether the plaintiff is entitled to file the suit in view of the pending appeal in the Hon'ble High Court against the order of dismissal of executing proceedings in Special Darkhast No.7/71?

(7) Whether the suit is maintainable without legal notice?

(8) What order and decree?

However, on an application filed by the defendant, issues no.6 and 7 were ordered to be heard as preliminary issues.

5. After hearing the submissions made on behalf of the parties, the learned Judge came to the conclusion that the suit was not maintainable without legal notice and that the plaintiff was not entitled to file the suit in view of the pending appeal in the High Court against the order of dismissal of execution proceedings. He, therefore, dismissed the suit.

6. The appellant has, therefore, filed this appeal challenging the said judgment and decree.

7. The learned counsel for the appellant submitted that the learned Judge has erred in holding that the suit was not maintainable without legal notice. He submitted that the claim raised in the present suit cannot be said to be "touching the business of the society" within the meaning of Section 167 of the Act. He also submitted that the learned Judge has erred in holding that the suit was not maintainable simply because the appeal against the order of dismissal of execution proceedings was pending in the High Court.

8. Now, Section 167 of the Act reads as follows:

"167. Notice necessary in suits. - Save as otherwise provided in this Act, no suit shall be

> instituted against a society, or any, of its officers, in respect of any act touching the business of the society, until the expiration of two months next after notice in writing has been delivered to the Registrar or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims, and the plaint shall contain a statement that such notice has been so delivered or left."

The expression "the suit in respect of any act touching the business of the society" occurring in the said provision was interpreted by the Division Bench in the case of (Shri) M.G. Patel & Co. vs. (Shri) Alka Co-operative Housing Society Ltd (1981 GLH 311). In that case, the plaintiff had sold the land to a housing society and he had filed the suit for the unpaid amount of consideration. It was held that the purchase of land was one of the main objects of the society and any cause of action that had got a direct bearing with the purchase of land has to be said as touching the business of the society. The plaintiff's claim for unpaid amount of consideration is directly rooted in the society's purchase of the land. It was, therefore, held that the suit in that case was a suit touching the business of the society and it was not maintainable without notice under Section 167 of the Act.

9. The ratio of the said decision is directly and squarely applicable to the facts of the present case. Here, the respondent Society is a housing society, which means that its object was to construct houses for its members. The society had given contract to the appellant for construction. The appellant's claim for the unpaid amount of its bill was directly rooted in the said contract for construction of the houses for the society. Hence, it cannot be urged that the subject matter of the suit was not touching the business of the society. The learned Judge, therefore, rightly held that the suit was not maintainable without notice under Section 167 of the Act.

10. The learned counsel for the appellant rightly contended that, in view of the finding that the suit was not maintainable without notice, it was not necessary for the learned Judge to decide any other issue including the issue as to whether the plaintiff was not entitled to file the suit in view of the pending appeal in the High Court against the order dismissing execution application. The said finding is, therefore, set aside as not

necessary.

11. In view of the above discussion, the final order of the learned Trial Judge dismissing the plaintiff's suit for want of notice under Section 167 of the Act cannot be said to be erroneous. The appeal, therefore, fails and is dismissed. No order as to costs.

(M.C. Patel, J.)

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